No. 18-266

In The Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CLAIMANT SEEKING RECOVERY FOR WRONGFUL DEATH OF CREWMEMBER AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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February 28, 2019

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. PUNITIVE DAMAGES ARE AN AVAILABLE REMEDY FOR UNSEAWORTHINESS CLAIMS INVOLVING WILLFUL AND WANTON MISCONDUCT, EVEN IN CASES ARISING FROM A CREWMEMBER'S DEATH	4
A. Punitive Damages Are Available Under The Jones Act	5
B. Allowing Recovery Of Punitive Damages For Unseaworthiness Claims Would Be Consistent With The Long History Of Authorizing Such Damages Under State Statutes That Governed Claims For Deaths On The Water Prior To The Jones Act	11
II. ANY LIMITATIONS ON RECOVERY OF "NONPECUNIARY" DAMAGES FOR WRONGFUL DEATHS DO NOT APPLY TO PUNITIVE DAMAGES	21
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Am. R.R. Co. v. Didricksen, 227 U.S. 145 (1913) 23

Atlantic Sounding Co. v. Townsend, 557 U.S. 404 (2009) .....*passim*

Austin v. United States, 509 U.S. 602 (1993) 21

Benner v. Truckee River Gen. Elec. Co., 193 F. 740 (C.C.D. Nev. 1911) 14, 20

Bennett v. Owens-Corning Fiberglas Corp., 896 S.W.2d 464 (Mo. 1995).....17

Boott Mills v. Bos. & M.R.R., 106 N.E. 680 (Mass. 1914).....16

Brickman v. S. Ry., 54 S.E. 553 (S.C. 1906).....15

Buckalew v. Tenn. Coal, Iron & R.R. Co., 20 So. 606 (Ala. 1896) 16

Calcaterr v. Iovaldi, 100 S.W. 675 (Mo. 1906) 17

Chi. Mill & Lumber Co. v. Bryeans, 209 S.W. 69 (Ark. 1919).....19

Christensen v. Floriston Pulp & Paper Co., 92 P. 210 (Nev. 1907).....14

Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).....8, 13, 21

Faulk v. Kansas City Rys. Co., 247 S.W. 253 (Mo. Ct. App. 1922).....18

Folz v. State, 797 P.2d 246 (N.M. 1990).....14

Goode v. Cent. Coal & Coke Co., 151 S.W. 508 (Mo. App. 1912).....17

TABLE OF AUTHORITIES – Continued

Page

Gulf, Colo. & Santa Fe Ry. Co. v. McGinnis, 228 U.S. 173 (1913) 23

Haley v. Mobile & O. R. Co., 66 Tenn. 239 (1874) 18

The Hamilton, 207 U.S. 398 (1907) 11, 12-13, 20

Harden v. Gordon, 11 F. Cas. 480 (C.C.D. Me. 1823) 2

The Harrisburg, 119 U.S. 99 (1886) 12

Keck v. United States, 172 U.S. 434 (1899) 22

Kennedy v. Davis, 55 So. 104 (Ala. 1911) 16

Klepsch v. Donald, 30 P. 991 (Wash. 1892) 15

Kopczynski v. The Jacqueline, 742 F.2d 555 (9th Cir. 1984) 21

Louisville & N.R. Co. v. Kelly's Adm'x, 38 S.W. 852 (Ky. 1897) 13, 18

Matthews v. Warner's Adm'r, 70 Va. (29 Gratt.) 570 (1877) 16

McBride v. Estis Well Serv., L.L.C., 768 F.3d 382 (5th Cir. 2014) (en banc) 21

Mich. Cent. R.R. Co. v. Vreeland, 227 U.S. 59 (1913) 9, 17, 22, 23

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) ..... *passim*

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 6, 12, 13

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 21

TABLE OF AUTHORITIES – Continued

Page

Nichols v. Winfrey, 79 Mo. 544 (1883) 17

Okla. ex rel. W. v. Gulf, C. & S.F.R. Co., 220 U.S. 290 (1911).....21

Olsen v. Mont. Ore Purchasing Co., 89 P. 731 (Mont. 1907) 19

Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924) 7, 9

Parker v. Fies & Sons, 10 So. 2d 13 (Ala. 1942) 16

Parsons v. Mo. Pac. Ry. Co., 6 S.W. 464 (Mo. 1888)..... 17

Seaboard Airline R.R. v. Koennecke, 239 U.S. 352 (1915).....20

Stang v. Hertz Corp., 463 P.2d 45 (N.M. App.), *aff'd*, 467 P.2d 14 (N.M. 1969) 14

St. Louis, Iron Mountain & S. Ry. v. Roberson, 146 S.W. 482 (1912).....20

Travelers Indem. Co. of Ill. v. Fuller, 892 S.W.2d 848 (Tex. 1995) 15

The Tungus v. Skovgaard, 358 U.S. 588 (1959).....12

Turner v. Norfolk & W.R. Co., 22 S.E. 83 (W. Va. 1895) 16

Vickery v. Ballentine, 732 S.W.2d 160 (Ark. 1987).....19

Workman v. City of N.Y., 179 U.S. 552 (1900) 11, 20

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996).....13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES & LEGISLATIVE MATERIALS

Death on the High Seas Act, ch. 111, § 5, 41 Stat. 537 (1920) 12, 13

Federal Employers Liability Act

45 U.S.C. § 51 ..... 5, 7, 8, 9

S. Rep. No. 61-432 (1910), *reprinted in* 45 Cong. Rec. 4040 (1910) 7, 8

Jones Act

46 U.S.C. § 30104 7

Merchant Marine Act, ch. 250, § 33, 41 Stat. 988 (1920) 7, 9

TEX. CONST. art. 16, § 26 note (Vernon 1993) (amendment added in 1869) 15

OTHER MATERIALS

Brian C. Colomb, McBride v. Estis Well Service, LLC: *The Seaman's Case for Punitive Damages Under His Unseaworthiness Claim and How the U.S. Fifth Circuit Got It Wrong, Again*, 14 LOY. MAR. L.J. 205 (2015) 13

RESTATEMENT (SECOND) OF TORTS (AM. LAW. INST. 1975) 22

TABLE OF AUTHORITIES – Continued

Page

David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COMM. 73 (1997) 6-7, 22

David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, 70 LA. L. REV. 463 (2010) 13

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Claimant Seeking Recovery for Wrongful Death of Crewmember, Maren Miller, has a pending claim under the general-maritime-law, unseaworthiness doctrine arising from the wrongful death of a crewmember killed in the service of his ship. *Amicus* seeks punitive damages in connection with that claim, alleging that the crewmember's death wrongfully resulted from the vessel owner's reckless and callous disregard for the vessel's safety.

Although the question presented addresses the availability of punitive damages to a non-fatal-injury claimant, *see* Pet. Br. i; Resp. Br. i, petitioner relies principally on cases decided in the wrongful-death context, in which unique historical considerations suggest some limitations that are irrelevant in the non-fatal-injury context. This Court may therefore resolve the question presented based on the absence of non-fatal-injury authority supporting the categorical ban on punitive damages that petitioner seeks.

If the Court does discuss historical considerations unique to wrongful death, however, *amicus* contends that those considerations are not determinative of the availability of punitive damages to wrongful-death claimants under the general maritime law. Because

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[1] The parties have granted blanket consent to the filing of *amicus* briefs. Pursuant to Rule 37.6, *amicus* confirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* or her counsel made a monetary contribution intended to fund the preparation or submission of this brief.

the parties have not fully briefed this distinct issue, *amicus* seeks to provide this Court with a broader understanding of why punitive damages are available whenever unseaworthiness claims arise from a vessel owner's sufficiently egregious conduct—not only when a crewmember seeks to recover for his or her own non-fatal injuries, but also when a fatally injured crewmember's surviving family members seek to recover for the crewmember's death.

The ability of all unseaworthiness claimants to seek punitive damages not only facilitates punishment of egregious maritime practices, but also incentivizes vessel owners to keep safe the "wards of the admiralty." *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (Story, J.). *Amicus* therefore urges this Court to reaffirm that punitive damages have longstanding roots in maritime law as a general tort remedy available in unseaworthiness actions whenever a defendant's misconduct satisfies the rigorous standard for awarding such damages. That result should not turn on whether the misconduct caused injury or death.

SUMMARY OF ARGUMENT

Because the question presented concerns the availability of punitive damages for an unseaworthiness claim alleging personal injury, Pet. Br. i; Resp. Br. i, this Court need not resolve whether punitive damages likewise would be available for an

unseaworthiness claim arising in the distinct context of a crewmember's wrongful death. If, however, this Court discusses that issue, it should confirm that a plaintiff in a general-maritime-law suit based on the death of a crewmember may recover punitive damages in an appropriate case that satisfies the rigorous standard for such an award.

Two independent reasons support this result. First, punitive damages are an available remedy under the Jones Act, a non-determinative reference point this Court has considered when addressing the scope of damages available to crewmembers under the general maritime law for claims that mirror causes of action previously created by Congress. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990); *see also Atlantic Sounding v. Townsend*, 557 U.S. 404, 415-24 & n.24 (2009). Although petitioner flatly asserts that the Jones Act does not permit punitive-damages awards, Pet. Br. 15, the Act's enactment history refutes that assertion, as does the Act's role as a remedial statute intended to maximize and safeguard the interests of the wards of the admiralty.

Regardless, this Court may look beyond the Jones Act because the remedies it affords are not always determinative of remedies under the general maritime law. *See Townsend*, 557 U.S. at 424 n.12. And in the context of wrongful death, a second basis for allowing punitive damages exists, drawing on their long history of availability under the state statutes that governed wrongful-death claims prior to the Jones Act. While this Court concluded in *Miles* that the history of

wrongful-death claims did not support allowing compensatory damages for nonpecuniary losses, 498 U.S. at 32-33, the record for punitive damages is different. Therefore, if the Court chooses to discuss whether punitive damages would be an available remedy for an unseaworthiness claim arising from a crewmember's death, it should hold that such damages are recoverable in appropriate cases when a vessel owner's conduct warrants such an award.

ARGUMENT

I. PUNITIVE DAMAGES ARE AN AVAILABLE REMEDY FOR UNSEAWORTHINESS CLAIMS INVOLVING WILLFUL AND WANTON MISCONDUCT, EVEN IN CASES ARISING FROM A CREWMEMBER'S DEATH.

This Court should hold that punitive damages may be recovered in connection with unseaworthiness claims. The availability of such damages should turn on the willful and wanton nature of the vessel owner's conduct, not on whether the conduct injures or kills the crewmember. Two factors bolster this result—the availability of punitive damages under the Jones Act, and the long history, prior to the Jones Act, of state statutes' authorizing punitive damages in wrongful-death cases.

A. Punitive Damages Are Available Under The Jones Act.

For general-maritime-law claims that mirror a cause of action previously authorized by Congress, this Court has held that the types of damages available to plaintiffs should be consistent with the damages available under the Jones Act. *See Miles*, 498 U.S. at 32-33 (evaluating the availability of loss-of-society damages for a wrongful-death, unseaworthiness claim in light of remedies under the Jones Act); *see also* Resp. Br. 30-32. And the enactment history and remedial purpose of the Jones Act refutes petitioner's claim that it does not authorize recovery of punitive damages. *See* Pet. Br. 15. To the contrary, the Jones Act's incorporation of the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, confirms the availability of such damages under the Act. *See* Injured Crewmembers Amicus Br. 5-28. Moreover, nothing in the Act demonstrates an intent to strip crewmembers of their longstanding right under maritime jurisprudence to recover punitive damages for unseaworthiness claims.

This Court considered Jones Act remedies when assessing the damages sought in both *Miles* and *Townsend*. In *Miles*, this Court considered the claim of a crewmember's mother under the general maritime law for "loss of society" damages after a fellow crewmember murdered her son. 498 U.S. at 21-22. As no general-maritime-law claim for wrongful death existed prior to the Jones Act, this Court reasoned that its own subsequent recognition of that claim should not afford remedies greater than the cause of action defined in the

preexisting statute. *Id.* at 23, 31-33. Because this Court concluded that loss-of-society damages were not permitted in wrongful-death cases under the Jones Act, it held, in turn, that damages for loss of society could not be recovered in connection with a general-maritime-law claim for wrongful death. *Id.* at 32-33.[2]

This Court in *Miles* did not address punitive damages, and it has never held that punitive damages are unavailable under the Jones Act. *See Townsend*, 557 U.S. at 424 n.12. This Court did address the issue of punitive damages in *Townsend*, however, assessing the availability of that remedy under general maritime law in the context of claims for failure to provide maintenance and cure. *See id.* at 409-14. In that context, this Court allowed punitive damages because, "[u]nlike the situation presented in *Miles*, both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act." *Id.* at 420. Indeed, after looking at the history of actions in general maritime law, this Court concluded that "prior to enactment of the Jones Act in 1920, 'maritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen.'" *Id.* at 412 (quoting David W. Robertson, *Punitive*

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[2] Because there was no general-maritime-law cause of action for wrongful death prior to the enactment of the Jones Act in 1920, *see Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393-94 (1970), there consequently was no pre-1920 general-maritime-law precedent awarding loss-of-society damages in connection with crewmembers' deaths.

Damages in American Maritime Law, 28 J. MAR. L. & COMM. 73, 115 (1997)).

Although the Court in *Townsend* did not decide whether punitive damages can be recovered under the Jones Act, 557 U.S. at 424 n.12, the historical availability of punitive damages in maritime jurisprudence, along with the enactment history of the Jones Act itself, confirms that punitive damages are recoverable in connection with Jones Act claims. As the Injured Crewmembers Amicus Brief (at 5-28) documents, the Jones Act incorporated the rights and remedies previously available to railway workers at common law because (i) FELA preserved those rights and (ii) the Jones Act, in turn, incorporated FELA's rights and remedies. *See* Merchant Marine Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. § 30104); *see also Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391-92 (1924) (recognizing incorporation of FELA and its amendments). Those rights included the ability at common law to recover punitive damages for egregious misconduct by railroad employers. *See* Injured Crewmembers Amicus Br. 10-13. Moreover, FELA's purpose was not merely to incorporate but also to *expand* railway workers' rights and remedies while leaving in place all previously available forms of recovery. *Id.* at 14-18; *see also* S. Rep. No. 61-432 (1910), *reprinted in* 45 Cong. Rec. 4040, 4044 (1910).

One of FELA's expansions was the creation of a cause of action for wrongful death that did not previously exist at common law. *See* 45 U.S.C. § 51. Yet, Congress did not differentiate remedies for the newly

created wrongful-death claim from remedies for injury-related claims that the common law previously recognized. Congress stated solely that railroads would be "liable in damages" for both. *See id.*[3] And those "damages" would have encompassed the punitive damages for injury claims that were previously available at common law, which FELA preserved and, through 45 U.S.C. § 51, made uniformly applicable to injury and wrongful-death claims. *See* Injured Crewmembers Amicus Br. 10-18 (discussing, *inter alia*, S. Rep. No. 61-432 (1910)).

It is implausible, therefore, to construe FELA, a remedial enactment designed to promote railroad safety and protect railway workers' rights, as somehow implicitly abrogating the common-law availability of punitive damages. *Id.* at 14-18; *cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488-89 (2008) (rejecting

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[3] The "liable in damages" language states in full that "[e]very common carrier by railroad" in interstate commerce

> shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

argument that the Clean Water Act, a statute protective of water rights, was meant to overturn, "*sub silentio*," oil companies' common-law duties and exposure for punitive damages in appropriate cases). And as punitive damages are available under FELA, so too must they be available under the Jones Act. *See Panama*, 264 U.S. at 391-92.

Although this Court in *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59 (1913), concluded that a FELA wrongful-death claim affords only pecuniary damages, thereby precluding an award of loss-of-society damages, *id.* at 71, that decision did not address the availability of punitive damages, which are distinct from nonpecuniary damages for loss of society. *See infra* Part II. And the availability of punitive damages under FELA's "liability in damages" language, which applies equally to injury and death claims, 45 U.S.C. § 51, establishes, in turn, the availability of punitive damages for both injury and wrongful-death claims under the Jones Act. *See* 41 Stat. 1007.[4]

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[4] This Court should reject the flawed contention of petitioner (at 28-29) and some of its *amici* that it would be anomalous to allow punitive damages for a vessel owner's misconduct that results in injury, given that those damages are unavailable when misconduct produces the more severe consequence of death. That argument rests on the false premise that punitive damages are not allowed in wrongful-death cases. The enactment histories and purposes of both FELA and the Jones Act, as discussed, refute that premise. *See supra* at 5-9. Regardless, even assuming the Jones Act does not affirmatively authorize punitive damages, it certainly does not clearly abrogate the common-law availability of punitive damages for general-maritime-law injury claims, which this Court has recognized. *See, e.g., Townsend*, 557 U.S. at

Moreover, the Jones Act, while incorporating the rights and remedies available under FELA, does not limit its protections to those available under FELA. This Court has recognized that crewmembers and their families have rights beyond those available to railway workers. *See, e.g.*, *Townsend*, 557 U.S. at 424 (authorizing punitive damages awards for "the willful and wanton disregard of the maintenance and cure obligation"—an obligation that does not exist in the railroad context); *see also* Injured Crewmembers Amicus Br. 29-30 (discussing additional situations in which crewmembers' rights exceed those available to railway workers under FELA). The availability of punitive damages under the Jones Act, in conjunction with the fact that maritime jurisprudence, prior to the Jones Act, "was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen," *Townsend*, 557 U.S. at 412, favors authorizing punitive damages for unseaworthiness claims under general maritime law, whether the claim is one arising from a personal injury or death.

415-18 (explaining why, as to maintenance-and-cure claims, "the Jones Act does not provide the punitive damages bar that petitioners seek"); *see also* Resp. Br. 32-42; Injured Crewmembers Amicus Br. 28. The most appropriate way to avoid an anomalous result would be to recognize the availability of punitive damages when a vessel owner's willful and wanton misconduct causes injury or death. That approach would enable punitive damages to fulfill their dual punishment and deterrent purposes in the context—death—where such damages are needed most.

B. Allowing Recovery of Punitive Damages for Unseaworthiness Claims Would Be Consistent With The Long History of Authorizing Such Damages Under State Statutes That Governed Claims for Deaths On The Water Prior To The Jones Act.

Although the history of wrongful-death actions under the general maritime law is not as unbroken as the history of the maintenance-and-cure action, there is nonetheless a long history—prior to the Jones Act—of *state* statutes affording both a cause of action and a remedy for wrongful deaths. Those state-created causes of action and remedies were available to claimants seeking recovery for deaths on the water, even at a time when no such cause of action existed under general maritime law. *See, e.g.*, *The Hamilton*, 207 U.S. 398, 405-07 (1907) (citing, *inter alia*, *Workman v. City of N.Y.*, 179 U.S. 552, 562-63 (1900) ("[I]t has been decided that although at the time of the adoption of the Constitution, in courts of admiralty as in courts of common law, a cause of action for a personal injury abated by the death of the injured party, nevertheless, when, by a state statute, a right of recovery in such a case was conferred, the admiralty courts would recognize and administer the appropriate relief.")). And a number of states authorized recovery of punitive damages, when appropriate, in connection with wrongful-death claims.

The history of wrongful death in the maritime context underscores the important role state statutes

played in the late nineteenth and early twentieth centuries in protecting the interests of the wards of the admiralty. In 1886, this Court held that no action for wrongful death was available under the general maritime law. *The Harrisburg*, 119 U.S. 99 (1886). And that remained the law until *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Moragne* overruled *The Harrisburg* and held that—in a legal landscape in which every state had a wrongful-death statute and Congress had enacted two statutes (DOHSA and the Jones Act) that provided for wrongful-death actions by crewmembers and others on the high seas—the general maritime law also should provide recovery for wrongful death. *Id.* at 390.

Even when recovery for wrongful death was not available under general maritime law, however, there was often an alternative source of recovery for wrongful death on the water. "At the time Congress passed the Jones Act and DOHSA, federal courts uniformly applied state wrongful-death statutes for deaths occurring in state territorial waters." *Miles*, 498 U.S. at 23-24 (citing 41 Stat. 537, 1007); *see also The Tungus v. Skovgaard*, 358 U.S. 588, 591 (1959) (referring to the "long-settled doctrine" that admiralty courts would hear such cases in accordance with the recovery afforded under state law). In fact, recovery under state wrongful-death statutes was available even after *The Harrisburg* held that recovery was not available under general maritime law.[5] *See, e.g., The Hamilton*, 207 U.S.

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[5] The available state statutes may not have provided recovery for wrongful death based on strict-liability unseaworthiness,

at 405-06. And, prior to the enactment of DOHSA, recovery grounded in state law even extended beyond territorial waters. *Id.*[6]

At the time the Jones Act was enacted, all 48 then-existing states had wrongful-death statutes. Brian C. Colomb, McBride v. Estis Well Service, LLC: *The Seaman's Case for Punitive Damages Under His Unseaworthiness Claim and How the U.S. Fifth Circuit Got It Wrong, Again*, 14 LOY. MAR. L.J. 205, 237 (2015) ("By the end of the nineteenth century, all states had adopted some form of death damages: *wrongful death*, *survival*, or both."). And a significant number of those states—at least 15 of 48—had statutes (or constitutional provisions) in place that allowed for the recovery of punitive or exemplary damages in wrongful-death cases.[7] The Nevada statute, for example, provided that

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see Moragne, 398 U.S. at 377, instead requiring a showing of negligence to establish liability. *See, e.g., Louisville & N.R. Co. v. Kelly's Adm'x*, 38 S.W. 852, 853 (Ky. 1897) (discussing Kentucky's statute allowing recovery for death resulting "from an injury inflicted by negligence or wrongful acts"). However, any case in which punitive damages are appropriate would involve, at the least, negligence. *See, e.g., Baker*, 554 U.S. at 492-93 (discussing the prevailing rule in American courts requiring heightened degrees of culpability for an award of punitive damages); David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, 70 LA. L. REV. 463, 464 (2010) ("Punitive damages aim at punishing reprehensible behavior, teaching the perpetrator not to do it again, and admonishing others never to do it").

[6] State wrongful-death statutes still apply to deaths of non-seafarers within territorial waters. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 216 (1996).

[7] *See infra* at 13-20 (discussing statutes from Alabama, Arkansas, Kentucky, Massachusetts, Mississippi, Missouri,

"[t]he jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just." *Benner v. Truckee River Gen. Elec. Co.*, 193 F. 740, 741 (C.C.D. Nev. 1911); *see also Christensen v. Floriston Pulp & Paper Co.*, 92 P. 210, 216-17 (Nev. 1907) (explaining that the only relevant difference between the Nevada and California wrongful-death statutes was that the Nevada statute permitted recovery of punitive damages).

The New Mexico statute was more specific on how a jury should determine the amount of "fair and just" damages awarded, but it was just as clear that exemplary damages were permitted. Like the Nevada statute, it states that "the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just," but it then continues, instructing the jury to "tak[e] into consideration the pecuniary injury or injuries resulting from such death to the surviving party . . . and also hav[e] regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default." *Stang v. Hertz Corp.*, 463 P.2d 45, 49 (N.M. App.), *aff'd*, 467 P.2d 14 (N.M. 1969); *see also Folz v. State*, 797 P.2d 246, 255-56 (N.M. 1990) (explaining that, in 1891, New Mexico supplemented its original 1882 wrongful-death statute to add an express provision allowing for punitive damages).

Montana, Nevada, New Mexico, South Carolina, Tennessee, Virginia, Washington, and West Virginia, as well as the Texas constitution).

Similarly, the South Carolina statute provided that "the jury may give such damages, including exemplary damages, where such wrongful act, neglect or default was the result of recklessness, willfulness or malice, as they may think proportional to the injury." *Brickman v. S. Ry.*, 54 S.E. 553, 557 (S.C. 1906). Washington also included in its statute the direction that "pecuniary and exemplary" damages were permissible, with its supreme court holding that exemplary damages were allowed "in cases of injuries caused by moral or legal wrong amounting to willfulness." *Klepsch v. Donald*, 30 P. 991, 994 (Wash. 1892).

Texas enacted a wrongful-death statute in 1860, drawing on English law. *Travelers Indem. Co. of Ill. v. Fuller*, 892 S.W.2d 848, 851 (Tex. 1995). But the Texas statute left an "ambiguity" regarding the availability of punitive damages to the decedent's heirs. *See id.* Rather than amend the statute, Texas resolved the ambiguity by amending the state constitution in 1869 "to allow for punitive damages in favor of the wrongful death beneficiaries." *Id.*; *see also* TEX. CONST. art. 16, § 26 note (Vernon 1993) (amendment added in 1869).

Other states had wrongful-death statutes that did not include the words "exemplary" or "punitive" in their text, but state courts construed them to provide for exclusively punitive damages based on the fault of the defendant, not the loss suffered by the plaintiff. In Alabama, for example, the relevant statute was the

"Homicide Act."[8] *See Parker v. Fies & Sons*, 10 So. 2d 13, 15 (Ala. 1942). The "purpose of the [Homicide Act] was not to compensate or recompense any one, but to mete civil punishment to the wrongdoer, and thereby prevent homicides," with the amount of damages left entirely in the discretion of the jury. *Kennedy v. Davis*, 55 So. 104, 105 (Ala. 1911). Similarly, the Massachusetts wrongful-death act was solely a punitive, rather than compensatory, provision. *Boott Mills v. Bos. & M.R.R.*, 106 N.E. 680 (Mass. 1914). West Virginia also had a statute that lacked any reference to punitive or exemplary damages per se, but that state's supreme court nonetheless held that juries had authority to award "fair and just" damages, subject to a statutory cap, that were "exemplary and punitive, as well as compensatory," and "[a]ny damages imposed in such cases are a forfeiture for the wrong done." *Turner v. Norfolk & W.R. Co.*, 22 S.E. 83, 87 (W. Va. 1895).

The Virginia Supreme Court determined that the expansive wording of its wrongful-death statute authorized all forms of damages, including punitive damages. *See Matthews v. Warner's Adm'r*, 70 Va. (29 Gratt.) 570, 576-77 (1877). The Virginia statute "declared that 'the jury in any such action may award such damages *as to it may seem fair and just*,'" the court noted, with "no words of limitation." *Id.* at 576-77.

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[8] Although called the "Homicide Act," the statute covered negligence as well as intentional killing. *Buckalew v. Tenn. Coal, Iron & R.R. Co.*, 20 So. 606, 609 (Ala. 1896) (noting that the Homicide Act authorizes recovery of damages for death caused by "the wrongful act, omission or negligence of any person").

The Mississippi Supreme Court undertook a similar analysis with its statute, which allowed "such damages as the jury may determine to be just, taking into consideration all of the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit." *Id.* This expansive language, the Mississippi Supreme Court held, was "broad enough to include damages of every kind and nature which might have been awarded to the decedent had he lived and brought suit, and which could be given to those persons who could bring the suit after his death." *Id.* Thus, a wrongful-death plaintiff could recover punitive damages under the statute. *Id.*

Incorporation of the phrase "aggravating circumstances" also was viewed as signaling an expansion of the types of available damages. As the Missouri Supreme Court observed, "[e]arly cases interpreted the authorization for damages based on aggravating circumstances to allow exemplary or punitive damages." *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 466 (Mo. 1995) (citing *Parsons v. Mo. Pac. Ry. Co.*, 6 S.W. 464, 468 (Mo. 1888), *Nichols v. Winfrey*, 79 Mo. 544 (1883), and *Goode v. Cent. Coal & Coke Co.*, 151 S.W. 508, 511 (Mo. App. 1912)); *see also Calcaterr v. Iovaldi*, 100 S.W. 675, 677 (Mo. 1906) (determining that exemplary damages are appropriate in cases of "wantonness" or "gross negligence").[9]

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[9] In addition to allowing punitive damages under the general wrongful-death statute, Missouri courts also allowed punitive damages under a statute governing claims for deaths caused by

The absence of a statutory limitation on the type of available damages was sufficient, in other states, to indicate that a general right to punitive damages had been extended to cases in which an injury resulted in death. In Kentucky, the state constitution stated: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful acts, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same." *Louisville & N.R. Co. v. Kelly's Adm'x*, 38 S.W. 852, 853 (Ky. 1897). The Kentucky Supreme Court held that this language was "intended to extend the common-law right of action to recover both compensatory and exemplary damages for injuries not resulting in death to cases in which death ensued." *Id.* at 854.

Other state courts were similarly unconstrained by the absence of an express authorization of punitive damages in their wrongful-death statutes. Thus, even though the Tennessee statute made no mention of punitive damages per se, the Tennessee Supreme Court unhesitatingly held that, "[o]ur statute provides that the right of action which a person, who dies from injuries received, would have had, had death not ensued, shall pass to his personal representative," and those rights included the right to exemplary damages. *Haley v. Mobile & O. R. Co.*, 66 Tenn. 239, 242 (1874).

The Montana Supreme Court looked to a general civil-damages statute to inform its interpretation of its

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railroads. *Faulk v. Kansas City Rys. Co.*, 247 S.W. 253, 253 (Mo. Ct. App. 1922).

wrongful-death act, which provided only that "such damages may be given as under all the circumstances of the case may be just." *Olsen v. Mont. Ore Purchasing Co.*, 89 P. 731, 734 (Mont. 1907). The state civil code, by contrast, expressly authorized exemplary or punitive damages, stating that "[i]n any action for a breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." *Id.* The court found "no reason" that the general provision regarding punitive damages should not also apply to wrongful-death actions. *Id.*

Finally, the Arkansas Supreme Court approved punitive-damages awards even though Arkansas's wrongful-death statute did not explicitly authorize such awards. The statute did, however, include language explicitly authorizing damages for loss of society and mental anguish, as allowing "such damages as will be fair and just compensation for the pecuniary injuries, including a spouse's loss of the services and companionship of a deceased spouse and/or mental anguish resulting from such death, to the surviving spouse and next of kin of such deceased person." *Vickery v. Ballentine*, 732 S.W.2d 160, 161 (Ark. 1987). Although this language did not speak to the availability of punitive damages, the Arkansas Supreme Court nevertheless approved such awards in early cases. *See Chi. Mill & Lumber Co. v. Bryeans*, 209 S.W. 69 (Ark.

1919); *St. Louis, Iron Mountain & S. Ry. v. Roberson*, 146 S.W. 482 (Ark. 1912).

As this survey shows, the recovery of punitive damages under state wrongful-death statutes was not consistent across all states, but a significant number of states did approve of the award of such damages. Punitive damages would, therefore, have been available to many plaintiffs bringing suit under state wrongful-death laws for deaths on the water, even prior to the Jones Act's enactment. *See, e.g.*, *The Hamilton*, 207 U.S. at 407; *Workman*, 179 U.S. at 562-63. And federal courts, including this Court, were aware of that fact. *See, e.g.*, *Seaboard Airline R.R. v. Koennecke*, 239 U.S. 352, 354 (1915) (acknowledging that the South Carolina wrongful-death statute under which plaintiff could have brought suit allowed recovery of exemplary damages); *Benner*, 193 F. at 741 (quoting Nevada statute that specifies exemplary damages may be awarded). This history, in conjunction with the fact that, "prior to enactment of the Jones Act in 1920, 'maritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen,'" *Townsend*, 557 U.S. at 412, militates in favor of authorizing recovery of punitive damages, when appropriate, for unseaworthiness claims, even when a crewmember's injury results in death.

II. ANY LIMITATIONS ON RECOVERY OF "NONPECUNIARY" DAMAGES FOR WRONGFUL DEATHS DO NOT APPLY TO PUNITIVE DAMAGES.

Some courts mistakenly have expanded the holding in *Miles*, 498 U.S. at 32-33, that one type of "nonpecuniary" damages—loss of society—may not be recovered in a wrongful-death action under the general maritime law as an automatic rejection of punitive damages in maritime cases. *See, e.g.*, *McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 390-91 (5th Cir. 2014) (en banc); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-61 (9th Cir. 1984). That expansion is unwarranted for two reasons. First, it is inaccurate to put punitive damages into the category of "nonpecuniary" damages. Second, whatever label is applied to punitive damages, those damages are categorically different from the damages considered in *Miles* and in the cases on which *Miles* relied.

Punitive damages are not properly classified as "nonpecuniary" damages. And this Court has never characterized punitive damages as "nonpecuniary," distinguishing instead between punitive damages and compensatory damages (which may include both pecuniary and nonpecuniary losses). *See, e.g.*, *Baker*, 554 U.S. at 489; *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Moreover, this Court has described a variety of fines and penalties as "pecuniary punishment." *See, e.g.*, *Austin v. United States*, 509 U.S. 602, 614 n.7 (1993); *Okla. ex rel. W. v. Gulf, C. & S.F.R. Co.*, 220 U.S.

290, 299 (1911); *Keck v. United States*, 172 U.S. 434, 448 (1899).

Nor does the Restatement of Torts endorse classifying punitive damages as "nonpecuniary." Instead, it lists four types of damages: "Compensatory Damages for Nonpecuniary Harm"; "Compensatory Damages for Pecuniary Harm"; "Nominal Damages"; and "Punitive Damages." RESTATEMENT (SECOND) OF TORTS §§ 905-08 (AM. LAW. INST. 1975). Compensatory damages for nonpecuniary harm, which includes damages for bodily harm and for emotional distress, are damages that can be awarded "without proof of pecuniary loss." *Id.* § 905. Punitive damages are damages "other than compensatory or nominal damages." *Id.* § 908; *see also* Robertson, 28 J. MAR. L. & COMM. at 80-81 (explaining that the pecuniary/nonpecuniary distinction is properly applied only to compensatory damages).

The Court in *Miles* based its denial of loss-of-society damages on a determination that the Jones Act allowed recovery of only pecuniary damages. *Miles*, 498 U.S. at 32-33. That interpretation was not based directly on the text of the Jones Act, but on the incorporation in that act of standards drawn from FELA. *Id.* at 32; *see also* Resp. Br. 4. And, previously, this Court had held that FELA allowed only pecuniary damages—a limitation not stated explicitly in FELA's text. *Miles*, 498 U.S. at 32 (citing *Vreeland*, 227 U.S. at 69-71). Instead, to interpret FELA, this Court looked in *Vreeland* to Lord Campbell's Act, the English predecessor to state wrongful-death statutes, as the first statute to permit recovery for wrongful death. 227 U.S.

at 71. As this Court stated, "[t]he word 'pecuniary' did not appear in Lord Campbell's act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage." *Id.* Thus, this Court held that damages for loss of society are not recoverable under FELA. *Id.* at 74.

The distinct issue of punitive damages, however, was not before this Court in either *Vreeland* or *Miles*. In fact, this Court has never addressed the availability of punitive damages under FELA.[10] Indeed, the Court's reference in *Vreeland* to the unavailability of *nonpecuniary* damages in "all those [statutes] which follow" Lord Campbell's Act, *id.* at 271, supports excluding punitive damages from the nonpecuniary category, given that many of those state statutes in fact allowed recovery of punitive damages in connection with wrongful-death claims. *See supra* at 11-20; *see also* Injured Crewmembers Amicus Br. 21-22. This Court's FELA and general maritime-law precedent, therefore, neither establishes that punitive

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[10] Lower courts that mistakenly have relied on *Vreeland* to prohibit awards of punitive damages often cite two other FELA wrongful-death cases decided by this Court that same year, but neither addressed punitive damages. *See Gulf, Colo. & Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 174-76 (1913) (addressing a non-dependent child's claim for compensatory damages); *Am. R.R. Co. v. Didricksen*, 227 U.S. 145, 149-50 (1913) (addressing loss-of-society damages); *see also* Injured Crewmembers Amicus Br. 25-28 (exposing lower courts' flawed reasoning that punitive damages were categorically unavailable under FELA).

damages are nonpecuniary in nature, nor precludes their availability in unseaworthiness claims, whether arising from a crewmember's injury or death.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 28, 2019